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IN THE

Supreme Court of the United States

OCTOBER TERM 196[illegible]

No. [illegible]/153

LEWIS S. TRAVIS

AND

JEAN S. TRAVIS,

Petitioners,

v.

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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No.

LEWIS S. TRAVIS
AND
JEAN S. TRAVIS,
Petitioners,
v.
UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners pray that a writ of certiorari be issued to review the order of the United States Court of Claims granting respondent's motion to dismiss or for summary judgment and denying petitioners' cross-motion for summary judgment entered in the above-entitled case on March 1, 1961.

Citation to Opinion Below

The opinion of the United States Court of Claims rendered on March 1, 1961, printed in the Appendix, *infra*, is reported in 287 Fed. (2d) 916 (1961).

Jurisdiction

The order of the United States Court of Claims was entered on March 1, 1961. A timely petition for reconsideration, printed in the Appendix, *infra*, was denied on May 3, 1961. The jurisdiction of this Court is invoked under 28 U.S. Code, Section 1255 (1), 62 Stat. 928.

Questions Presented

1. In a Federal condemnation case where landowners have defended against the validity of the condemnation and have had no hearing on, or trial of, their defenses, should not the ruling below, that a declaration of taking, filed in said condemnation case, vested fee simple title in the United States, be reversed on the ground that it conflicts with this Court's decision in *Catlin* v. *United States*, 324 U.S. 229, at page 241?

2. In a Federal condemnation case where landowners contest the validity of the condemnation should it not be a condition precedent to the filing of a declaration of taking therein that the United States move successfully either to dismiss the answer or for summary judgment, since procedural due process guarantees a right to be heard?

3. In the administration of the provisions of the Declaration of Taking statute by the Department of Justice should that Department allow considerations of convenience to outweigh considerations of its responsibitilty to safeguard the rights of citizens to due process, especially when this Court has ruled favorably to the citizen on the question?

Statutes Involved

Declaration of Taking statute, 46 Stat. 1421, 40 U.S.C. 258 a-f.

Act of September 1, 1959, 73 Stat. 451[1].

Statement

The United States brought condemnation proceedings against the landowners (R. 3, 46-54, 58)[2], who are the plaintiffs here. The landowners challenged the validity of the condemnation proceedings by denial, affirmative defense, and demand for strict proof of all of the allegations of the complaint not denied (R. 4, 61-62). All this took place during the month of February, 1958. (R. 3, 4.)

The case was set down for trial at a future date, namely April 12, 1960 (R. 5, 136-137). But no hearing on, or trial of, the defenses ever took place. (R. 85-86.)

However, on September 11, 1958 (several months after the case had been brought to issue by the landowners' answer) the United States filed a declaration of taking in the case (R. 3, 65-69). About one year later, the Congress granted authority to the Federal Aviation Agency, the initiating agency in the condemnation action, to donate full ownership of a part of the property (the mansion "Leeton") to some one else (Act of September 1, 1959, 73 Stat. 451)[3]. This authority to donate was based on the assumption that the United States had fee simple title to all of the landowners' property. (Act of September 1, 1959, *supra*, first sentence after the enacting clause.) The authority so granted was exercised on February 1, 1960. (R. 9.) It is obvious, of course, that all these proceedings took place before the trial date of April 12, 1960.

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[1] Due to their length these provisions of law have been printed in full in the Appendix.

[2] All references in parentheses preceded by the letter "R" are to the certified Record of the United States Court of Claims.

[3] Appendix pp. 5a-6a.

The landowners have taken the position that February 1, 1960, was the actual date of taking and accordingly brought action in the United States Court of Claims for the value of their property as of that date. (R. 9.) The Court below has dismissed the landowners' complaint on the assumption that, despite the fact that defenses had been interposed and no hearing or trial had been held thereon, nevertheless the United States acquired fee simple title to the landowners' property on September 11, 1958, by the filing of the declaration of taking. If this premise is correct then the conclusion of the Court of Claims that the United States could give it away cannot be contested. However, the landowners contest the correctness of that premise.

Reasons for Granting the Writ

I.

The core of the decision of the Court below is in the following passage:

> "If, as the statutory and case law holds, the United States acquired title to the lands at issue on September 11, 1958, with the declaration of taking, then the legislature had the right and power to dispose of them one year later." (R. 165.)

The error in the above statement is obvious. This Court, in *Catlin* v. *United States* (1945) 324 U.S. 229, has stated that where a landowner contests the validity of condemnation and has had no hearing on, or trial of, his defenses, to hold that a declaration of taking filed in such a case vests fee simple title in the United States would leave the owner "no opportunity to question the taking's validity." (324 U.S. at p. 241.) In other words, if fee simple title may be so obtained the Government may, by the *ex parte* filing of a

document, the declaration of taking, strike out all defenses to condemnation without trial.

This Court proceeded to say that if, despite no hearing on the contest of a condemnation, the effect of filing a declaration of taking is to vest fee simple title in the United States, such would "raise serious question concerning the validity" of the Declaration of Taking statute (324 U.S. at page 241) since such result, of course, would be in clear violation of procedural due process. It was then ruled that to say fee title could be so obtained "would run counter to what reasonable constuction of the statute requires." (324 U.S. at p. 241.)

Thus it is apparent that case law holds a reasonable construction of the Declaration of Taking statute to be that the United States did *not* acquire fee title to the lands at issue on September 11, 1958, with the declaration of taking. The entire case of the United States here is bottomed on the assumption that it had complete fee ownership of the property prior to September 1, 1959. The *Catlin* decision is to the contrary.

This, alone, should justify reversal of the judgment below.

II.

The issue in this case, moreover, involves a Federal question of increasing importance. Apparently the inevitable necessity of the future is the ever-widening of the activities of the Federal Government. One of the results thereof will be great expansion of the power of eminent domain for airport, highway, housing, water resources, and like purposes. But these public investment programs should not be accompanied by a diminishing due process, insofar as the individual is concerned. As contrasted with some other governmental climes, our tradition demands that so long as a man is sued, even by his own Government, he may defend. In a suit under an asserted power of eminent domain, if the defendant is successful in defending

he keeps his land. Otherwise the judical procedure is a farce.

This points up the necessity that some lines of guidance be furnished the Department of Justice in connection with the use of the Declaration of Taking procedure. Its wholesale use in all cases by that Department verges on the irresponsible. This Court has already expressed doubt as to what property right, if any, is obtained by the filing of a declaration of taking in a condemnation case where the owner contests the validity of Government expropriation and has had no trial of his defenses. *Catlin v. United States*, *supra*. 324 U.S. at p. 241. The suggestion made in that case that the United States obtains "only a defeasible fee" under such circumstances, is based on the premise that the Government's defeasible fee results in fee simple title back to the owner if his defenses are successfully maintained.

But here, however, the United States has by statute presumed to give the very property away before trial. Worse even, the donee has destroyed the property. (R. 9, 161.)

This is the only case counsel have had brought to their attention where, pending trial of defenses in a condemnation action, the landowners involved have had fee title to their property vested by statute in some one else.

Hence there is squarely before this Court for the first time the necessity of deciding what property right, if any, the United States does obtain when it files a declaration of taking in a defended condemnation suit prior to trial or hearing of the defenses.

Utmost confusion exists on the point. This Court has admitted to "doubt" as to the Government's property right under such circumstances (329 U. S. at p. 241) and the suggestion, "defeasible fee", (id.) is obviously not applicable to undefended condemnation suits. The Department of Justice, despite this Court's language in the *Catlin* case, continues to insist that the Government obtains fee simple title in defended cases (R. 33, 34, 150, 151-152) and even has the temerity to cite the *Catlin* decision in support of this

assertion. (R. 33.) The Court below has agreed with the Department of Justice (R. 165). The landowners here insist that no property right whatsoever is obtained by the United States by the filing of the discussed document in a defended case before hearing or trial of the defenses. (R. 167-173.)

Counsel understands that it is a condition to the obtaining of Government funds for the money deposits accompanying the filing of declarations of taking that the Department of Justice certify that such filing and deposits vest "fee simple title absolute" in the United States. The day will come, of course, when a landowner will successfully defend against Government condemnation where a declaration of taking has been filed and the money deposited in court has been withdrawn. At that time the accounting branch of the Government may very well evince a lively interest concerning a practice of the Department of Justice of expending government funds for "defeasible fees." Especially since the landowner involved could well assert that the Government should share the fate of all others who pay money under mistake of law.

The entire problem can be solved by this Court by an expression of opinion that no declaration of taking should be filed in a contested condemnation case unless and until the Government has successfully moved either to dismiss the answer or for summary judgment.

III.

Of possibly graver moment is the point of administrative practice on the part of the Department of Justice. That Department is well aware of the ruling of this Court in *Catlin v. United States*, *supra*. Nevertheless, it continues to assert before the Courts that the filing of a declaration of taking vests fee simple title in the United States in *all*

cases, i.e. both in defended as well as in undefended condemnation suits.

Of course, there is no doubt that the effect of the filing of that document is to vest fee title in the United States in cases where no defense is made against the validity of the of the condemnation. But, as already pointed out, *Catlin v. United States*, *supra*, expressly holds that the United States does not get fee simple title by filing this paper when defenses have been interposed and have not been tried.

It is difficult to escape the impression that the Department of Justice just does not like this Court's decision in the *Catlin* case and, accordingly, compels every defending landowner to fight his way through all the Courts when he asks that his rights be determined by the language of that case. It is obvious that it would be much easier and more convenient for Government counsel to have every condemnation case reduced to a mere discussion of the amount of the money award. Every land-hungry bureaucracy also welcomes such a development.

But the Department of Justice is also supposed to be the citizen's protection against violation of constitutional safeguards and this position of trust should not be lightly regarded. In all of its actions it should at least follow the forms of due process.

Furthermore, this case indicates the dangers underlying the enactment of such "department sponsored" legislation as the Declaration of Taking statute. It is not too far from the wresting of property from the citizen to the wresting from him of his personal liberty. *Hovey v. Elliott* (1897) 167 U.S. 409, 419. Thus, the Court below has held that the filing of the declaration of taking vests fee simple title in the United States in all cases, and intimates that even had these landowners successfully defended in the District Court condemnation suit they could have regained their property only by Act of Congress. (R. 163.) But in this case even that result would not have been possible since by Act of Congress the property in the meantime had not

only been given away but also the donation was, by statute, under conditions compelling destruction.

Might, then, the Congress enact a law to the effect that upon indictment and arraignment for the commission of a Federal crime the Department of Justice could, *ex parte*, file a "declaration of criminality," pursuant to which a citizen would summarily be "deemed" guilty, immediately sentenced to prison, and even if upon later trial he were to be found innocent, could obtain release from incarceration only by an Act of Congress? These landowners can see no flaw in the analogy.

Conclusion

For the above reasons and for assurance of due process to all citizens who may defend against Federal condemnation, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

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CONSTITUTION OF THE UNITED STATES OF AMERICA

RIGHTS OF PERSONS

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

TITLE 40—UNITED STATES CODE

258a. In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the

value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

258b. No appeal in any cause under section 258 of this title nor any bond of undertaking given therein shall operate to prevent or delay the vesting of title to such lands in the United States.

258c. Action under section 258a of this title irrevocably committing the United States to the payment of the ultimate award shall not be taken unless the chief of the executive department or agency or bureau of the Government empowered to acquire the land shall be of the opinion that the ultimate award probably will be within any limits prescribed by Congress on the price to be paid.

258d. The right to take possession and title in advance of final judgment in condemnation proceedings as provided by section 258a of this title shall be in addition to any right, power, or authority conferred by the laws of the United States or those of any State or Territory under which such

proceedings may be conducted, and shall not be construed as abrogating, limiting, or modifying any such right, power, or authority.

258e. In any case in which the United States has taken or may take possession of any real property during the course of condemnation proceedings and in advance of final judgment therein and the United States has become irrevocably committed to pay the amount ultimately to be awarded as compensation, it shall be lawful to expend moneys duly appropriated for that purpose in demolishing existing structures on said land and in erecting public buildings or public works thereon, notwithstanding the provisions of section 255 of this title: *Provided*, that in the opinion of the Attorney General, the title has been vested in the United States or all persons having an interest therein have been made parties to such proceeding and will be bound by the final judgment therein.

258f. In any condemnation proceeding instituted by or on behalf of the United States, the Attorney General is authorized to stipulate or agree in behalf of the United States to exclude any property or any part thereof, or any interest therein, that may have been, or may be, taken by or on behalf of the United States by declaration of taking or otherwise.

Public Law 86-220
86th Congress, H. R. 4329
September 1, 1959
73 Stat. 451

AN ACT

To provide for the conveyance to any public or private organization of the State of Virginia of certain dwellings acquired in connection with the Chantilly airport site, Virginia, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the frame and brick dwellings known respectively as Sully and Leeton, located on the former Sully Plantation near Chantilly in Fairfax County, Virginia, acquired by the United States pursuant to the Act of September 7, 1950 (64 Stat. 770), shall not be demolished by any agency of the United States prior to December 31, 1959. Upon request therefore prior to December 31, 1959, the Administrator of the Federal Aviation Agency is authorized—

Sully Plantation.
Chantilly, Va.
Preservation and conveyance.
D.C. Code 7-1401 to 7-1412.

(a) to convey to any public or private organization of the State of Virginia, without cost, title to the buildings known as Sully and to grant an easement for use of such land as the Administrator considers necessary for maintenance of such buildings for historic purposes; provided that any such conveyance and easement shall be conditioned upon (1) continued preservation, maintenance and exhibition of such buildings for historic purposes, (2) a covenant not to use the property as a place of public assembly, (3) a covenant not to use the property for commercial purposes and (4) such other conditions as the Administrator considers necessary to protect the interests of the United

States; and upon a provision that if such conditions are not complied with the title to such buildings shall revert to the United States and such easement shall terminate; and* 73 STAT. 451 | 73 STAT. 452.

(b) to grant a right to any applicant to which a conveyance is made pursuant to paragraph (a) hereof, without cost, to dismantle the buildings known as Leeton, and to salvage and remove any and all material considered by such grantee to have a historic value; provided that the grant of such right shall be conditioned upon an obligation of the grantee to remove all material and structures, whether or not of historic value, from the land occupied by such buildings and to restore the land to a condition satisfactory to the Administrator, including, but not limited to, the removal of all debris and the filling of all wells and basement and septic tank excavations. Leeton buildings. Dismantling and salvage.

Approved September 1, 1959.

In the United States Court of Claims

No. 218-60

(Decided March 1, 1961)

LEWIS S. AND JEAN S. TRAVIS v. THE UNITED STATES

Ernest N. Hudgins for the plaintiffs.

Howard O. Sigmond with whom was *Assistant Attorney General Perry W. Morton*, for the defendant.

ON DEFENDANT'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT AND PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

DURFEE, *Judge*, delivered the opinion of the court:

This is an action to recover for the taking of real property without just compensation. The plaintiffs have been awarded compensation by the United States District Court for the Eastern District of Virginia based on the value of the land on September 11, 1958, the date of the filing of a declaration of taking by the defendant. But they allege that the taking really occurred on February 1, 1960, by which date the value of the property had increased considerably because the area had been rezoned by county authorities.

In 1950, the Congress authorized the construction, development and operation of a public airport to service the National Capital area. The site chosen for the so-called Dulles International Airport is in Fairfax County, Virginia, near the town of Chantilly. In January 1958, the United States instituted an action in the district court to acquire fee simple title to those lands in Fairfax and Loudoun Coun-

ties which were deemed necessary for the airport development. The complaint relied for the taking on the authority of the act of August 1, 1888, 25 Stat. 357, 40 U.S.C. 257; the act of September 7, 1950, 64 Stat. 770; and the Supplemental Appropriation Act approved August 28, 1957, 71 Stat. 426. Also in January 1958, the district court entered an order granting the United States possession of the lands which were the subject of the condemnation action. The plaintiffs, as defendants in that suit, filed an answer denying that the taking was for a valid public purpose and asserting that the two parcels of land which they owned were not susceptible of a taking for the purposes set forth in the Government's complaint.

The parcels of land owned by plaintiffs at the time the condemnation action was commenced were within the proposed exterior boundaries of the airport. Situated thereon was a house known as "Leeton" built by an uncle of Robert E. Lee in the early days of the Republic and of some historic interest. Although the exterior was authentic, the interior was of fairly recent construction. Nearby, but on other lands, another house of historic interest known as "Sully" was located.

The district court vacated its original order of possession in July 1958 and made the right of the United States to take possession contingent on the filing of a declaration of taking. This the United States did on September 11, 1958, at the same time depositing with the court the estimated just compensation for the lands taken. The value of plaintiffs' lands was estimated at $75,000 and this amount was later withdrawn from the court by them. Declaration of Taking No. 15 cited the statutes relied on in the complaint and other statutes including the Declaration of Taking Act, 46 Stat. 1421, 40 U.S.C. 258a.

The trial of the condemnation suit as it applied to these

plaintiffs was set for April 1960. However, on September 1, 1959, the first sesson of the 86th Congress approved Public Law 86-220, 73 Stat. 451, which was based on the premise that title to the parcels of land previously owned by the plaintiffs had devolved to the United States and which gave the United States the power to designate any public or private corporation in Virginia as the proper agency to dismantle "Leeton" and to preserve "Sully", it having been decided that "Sully" was an appropriate site for preservation but that "Leeton" was not. Accordingly, the Fairfax County Park Authority was designated as the qualified organization to acquire the buildings and to conduct the preservation, salvage, and removal operations. On February 1, 1960, the park authority assumed physical control of "Leeton" and began razing the building. On April 26, 1960, the court-appointed commissioners filed their valuation report advising that the total fair value of plaintiffs' parcels of land and improvements was $79,250, or $4,250 more than the amount deposited by the United States at the time of the filing of the declaration of taking. It appears that at the time set for trial in the district court the proceedings were restricted to an inquiry into the amount of compensation. It further appears that if there were genuine issues created by the complaint and answer in the action in the district court, no final judgment thereon has been rendered.

The petition asks us to determine that the taking of the two parcels of land did not occur until February 1, 1960, when the defendant's designees physically entered upon the premises. To so hold we would have to decide that the condemnation proceedings, including the declaration of taking, were invalid and ineffective to confer title on the United States. Such a holding would contain the implicit determination that the act of Congress of September 1, 1959, is a nullity because it authorized the United States to dispose of something which it did not own.

Plaintiffs compute the value of the lands involved, zoned for industrial purposes on February 1, 1960, at a figure in excess of $3 million. They also include in their damages prayer the value of "Leeton" which, of course, no longer exists. If the position of the defendant, namely that the United States acquired title to plaintiffs' lands by virtue of the declaration of taking of September 11, 1959, is correct, then the matter of just compensation can be, and apparently has been settled in the district court.

The defendant's position is based on the Declaration of Taking Act, *supra*. The text of the act is set forth in the margin [1] and provides, in substance, that in any condemnation action, the Government may, contemporaneously with the filing of the petition or any time prior to judgment, file a declaration of taking covering the lands described in the petition. The declaration must contain certain prescribed statements and descriptions and if, at the time the declaration is filed the United States deposits the estimated compensation for the lands with the court, title in fee simple absolute or some lesser estate, if requested, will then vest in the United States. At the same time, the right to immediately receive the estimated compensation vests in the landowner.

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[1] Title 40 U.S.C.:

§ 258a. Same; lands, easements, or rights-of-way for public use; taking of possession and title in advance of final judgment; authority; procedure.

In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

It has been repeatedly held that under the statute title to the realty vests in the United States immediately upon the filing of a declaration of taking and the payment into the court of the estimated compensation. *U.S.* v. *Hayes*, 172 F. 2d 677 (2d Cir. 1949); *U.S.* v. *150.29 Acres of Land, More or Less, in Milwaukee County, Wis., et al.*, 135 F. 2d. 878 (7th Cir. 1943); *U.S.* v. *Sunset Cemetery Co.*, 132 F. 2d 163 (7th Cir. 1942). It has also been held that the Act does not work an unconstitutional deprivation of property without due process since it provides for the payment of just compensation. *City of Oakland* v. *U.S.*, 124 F. 2d 959 (9th Cir. 1942); *U.S.* v. *47.21 Acres of Land, Parcel No. 5, et al.*, 48 F. Supp. 73 (1943); *U.S.* v. *Eighty Acres of Land in Williamson County, Ill., et al.*, 26 F. Supp. 315 (1939).

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(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compenation (*sic*) stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith

In their briefs, the plaintiffs have outlined the theory they intended to advance in their defense of the condemnation action in district court, which, they say, if found to be correct would result in a judgment in their favor. They say that if the district court action had gone to judgment in their favor, the declaration of taking would fail. We do not pass on the validity of the plaintiffs' defense to the condemnation suit. But it is perhaps worth noting that there is no clear agreement on what would be the effect on a previously filed declaration of taking, of a failure of the condemnation suit, in the courts which have commented on this point. Under the facts in *U.S.* v. *Carey et al.*, 143 F. 2d 445 (9th Cir. 1944), it was held that the dismissal of the condemnation petition would not result in a divesting of the title acquired by the United States as a result of a declaration of taking. The suggestion was made by the court in *U.S.* v. *12,918.28 Acres of Land in Webster Parish, La., et al.*, 50 F. Supp. 712 (1943), that the United States could be divested of title acquired through a declaration of taking only by appropriate congressional action It has been held that judgment entered on a declaration of taking cannot be vacated and that the court has no power to strike the declaration itself in the absence of bad faith. *In Re United States*, 257 F. 2d 844 (5th Cir. 1958); *U.S.* v. *44.00 Acres of Land, More or Less, Situate in the Town*

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for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

of Greece, County of Monroe, 234 F. 2d 410 (2nd Cir. 1956) cert. den. 352 U.S. 916; *U.S.* v. *Hayes*, *supra*.

On the other hand, it has been suggested that when the condemnation proceedings fail for lack of a valid statutory authority, the declaration of taking fails with it. We are not prepared to say that this is a correct statement of the law since we have been unable to locate any case in which a declaration of taking was nullified as a result of the Government's failure to prevail in its condemnation suit. In any event, whether the condemnation action has gone to judgment in the landowners' favor, thus perhaps nullifying the declaration of taking, seems to us to be a question peculiarly within the province of the district court. Our understanding is that the plaintiffs, dissatisfied because the district court proceedings were restricted to the question of just compensation, have refused to withdraw from the court the additional compensation awarded. Hence, no final judgment has been entered in the district court; certainly no judgment has been entered determining the condemnation action to be invalid because of an excessive or unauthorized taking. In the absence of any such judgment, the basic premise for plaintiffs' challenge to vesting of title in the United States through the declaration of taking dissolves.

The same parties who are before us in this action, the petition in which raises the questions if and when the Government could acquire the Travis property, were before the United States District Court in an action involving essentially the same considerations. The plaintiffs in this action claim to have there raised the question of the validly of the condemnation, one phase of which was the declaration of taking. Any answer to a condemnation complaint must conform to the provisions of Rule 71A of the Federal Rules of Civil Procedure. Whether the Travises have satisfied this requirement is again a matter peculiarly for

the determination of the district court which had jurisdiction over the parties and the issues.

We perceive no reason why, at the proper juncture, the problems of the sufficiency of the answer and the district court's restriction of the trial to the matter of compensation cannot be presented by plaintiffs to the Court of Appeals. Likewise, had there been a full hearing on the authority of the United States to take plaintiffs' lands which resulted in a clear verdict against the plaintiffs, we think that that matter, too, could be properly presented to the Court of Appeals at the appropriate time.

The plaintiffs have characterized the act of September 1, 1959, which authorized the Fairfax County authorities to take control of the land formerly owned by them, as unconstitutional for a variety of reasons. But this position has as its foundation the premise that the declaration of taking, filed almost one year before passage of the act, did not pass title to the United States. But, as we have noted, the authority is overwhelming for the position that in the absence of a judgment invalidating or modifying a declarition of taking title to the property has vested in the United States as of that moment. If, as the statutory and case law holds, the United States acquired title to the lands at issue on September 11, 1958, with the declaration of taking, then the legislature had the right and power to dispose of them one year later. This of course depends upon the original acquisition having been authorized by law and within proper limits. But, as we have said, there has been neither showing nor determination that this was not the case.

Plaintiffs contest the validity of the 1950 airport authorization, and, presumably, they would have raised the same objections in the district court had they been permitted to do so. Not only was this the proper forum for such an issue, but it is also our understanding that the suit in that court is still under submission and no final decision has been entered.

As we observed at the outset, the plaintiffs' theory of recovery depends upon the invalidity of the declaration of taking which vested title in the United States. They have presented us with no sound reasons why the vesting of title should be invalidated. Moreover, the district court, before which the plaintiffs claim to have put this question in issue, has taken no action to invalidate the declaration. Hence, until and unless the declaration fails, the lands in question are the property of the United States and were correctly considered so in the act of September 1, 1959. Therefore, the taking occurred on September 11, 1958, and the plaintiffs have been awarded full compensation for the taking as of that date. The defendants' motion is granted and that of the plaintiff is denied. Plaintiffs' petition will be dismissed.

It is so ordered.

LARAMORE, *Judge*; MADDEN, *Judge*; WHITAKER, *Judge*, and JONES, *Chief Judge, concur.*

IN THE UNITED STATES COURT OF CLAIMS

LEWIS S. TRAVIS
AND
JEAN S. TRAVIS,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA,
Defendants.

No. 218-60

MOTION FOR RECONSIDERATION

Come now the plaintiffs and respectfully request this Honorable Court to reconsider its decision dismissing plaintiffs' petition, and for grounds therefor state:

This case squarely raises the issue of the effect of the filing of a declaration of taking in a condemnation proceeding where the landowners have defended against the authority of the Taking Agency—where the very validity of the taking is contested.

The Department of Justice has argued that under these circumstances title in fee passes to the United States. (D. br. pp. 11-12; D. rep. br. p.2) This Honorable Court has indicated approval of this assertion. (Opinion of March 1, 1961, pp. 5-6.)

The Plaintiffs must respectfully insist that *when defenses are interposed to the validity of a condemnation proceeding*, the United States obtains no fee simple title by

filing a declaration of taking. *Catlin* v. *United States* (1945) 324 U.S. 229, 241.[1]

It is only when no defense is interposed, i.e. where the authority to take is conceded, that the filing of a declaration of taking in a condemnation proceeding, has the effect of vesting a title in fee simple absolute in the United States. When a citizen defends against the very validity of a taking, a ruling, that, nevertheless, the United States may obtain irrevocable title by the filing, *ex parte*, of a declaration of taking, is in violation of Due Process.

FACTS

Simplified, the facts here are as follows:

The United States brought action to condemn plaintiffs' lands. The Plaintiffs defended in that action, challenging the validity of the taking. The United States then filed a Declaration of Taking. The case was set for trial on a certain date. Prior to this trial, the Congress gave away the very property involved under conditions which rendered it impossible for the landowners, the plaintiffs here, to regain it.

ARGUMENT

WHEN THE UNITED STATES FILED THE ABOVE DECLARATION OF TAKING IT OBTAINED NO PROPERTY RIGHT IN PLAINTIFFS' HOME AND LANDS.

This Honorable Court's attention is directed to the language set forth in the opening paragraph of the Declaration

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[1] It is obvious, of course, that if a declaration of taking has the effect of vesting fee simple title in the United States in all cases, the result will be that no one may ever defend against Federal condemnation, however meritorious his defenses may be. Even if the taking statute itself were held unconstitutional and void the Department of Justice presumably would maintain that where condemnation proceedings had been instituted thereunder, a declaration of

of Taking statute. 40 U.S.C. Sec. 258a. It is provided there that the condemnation proceedings in which declarations of taking may be filed are to be those which are "instituted under the authority" of the United States for acquisition of land for "public use". If a landowner questions either the "authority" or the asserted "public use", then the condition of the statute is not met, and the document should not be filed until the defenses are dismissed for want of merit. This can be done by a successful motion for summary judgment. Here the landowners contested the authority to take (Pl. br. pp. 14-26) and have also shown that the taking was obviously not for "public use". (Pl. br. p. 48.)

The statute is therefore entirely clear. There can be no doubt that the declaration of taking procedure there provided for is to be used only in those cases where no contest is made by landowners as to the authority of validity of the taking—only in those cases where the sole question is the amount of money which should be paid as just compensation.

But confusion has been caused by the practice of the Department of Justice to file declarations of taking in *all* cases whether or not a defense is made by landowners. This unauthorized use of process has been pointed out in several cases, (*City of Oakland* v. *United States*, 124 F. 2d 959, 962-963 [9th Cir.1942]; *Catlin* v. *United States*, *supra*) and by these plaintiffs with varying results. Indeed, in the *Catlin* case, *supra*, 329 U.S. 229, the Supreme Court itself has felt compelled to say that the effect of the filing of this document is "not wholly free from doubt" in cases, such as the one here presented, where the validity of the taking is contested. (329 U.S., at p. 241.)

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taking filed in that case, also, would vest fee title in the United States. This Court's attention is drawn to *Nichols* v. *City of Cleveland*, 247 F. 731 (6th C., 1917) where the Court, on page 740, ruled that the contrary is "too plain for argument".

Assuming then, for purposes of argument, an ambiguously worded statute is before this Honorable Court for interpretation, the following well known canons of construction may be urged to clarify its meaning.

A. Legislative History.

The legislative history of the Declaration of Taking statute shows that it was to be used "solely" in those condemnation cases where the taking agency had "the right to take a piece of property for the public use and the *only* thing that an owner has is the right to just compensation." (Italization supplied.)

This statement was made by Representative Graham who was in charge of presenting the legislation to the House of Representatives.[2]

Thus the legislative history of the statute clearly shows the Congress meant that the declaration of taking should be filed solely in cases where a landowner has conceded the authority to take, has defaulted in answering to the merits, and quarrels only about how such money he should get.

B. Strict Construction in Favor of the Landowner

1. The Declaration of Taking statute is a condemnation statute. Such statutes are, in the absence of any particular legislative mandate to the contrary, always strictly construed in favor of the landowner, and against the United States. *Nichols, Em. Dom.*, 3d Ed. Sec. 24.2(1); *Del., L. & W. R. R.* v. *Morristown* (1928) 276 U.S. 182, 192; *Cincinnati* v. *Vester* (1930) 281 U.S. 439, 448. (The rule is recognized [although not applied, since the statute involved by its very terms required "liberal construction"] in *United States ex rel. T. V. A.* v. *Welch* (1946) 327 U.S. 546, 551). See, also, *U.S.* v. *86.6 Acres* (D. Ct. N.H., 1942) 44 F. Supp. 495, 498;

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[2] For reference to the above legislative history it is not necessary to consult the Congressional Record. The quoted statement is set forth in the margin of the opinion of Moskowitz, District Judge in *United States* v. *Certain Lands*, (E. Dist. N. Y., 1941) 39 F. Supp. p. 91, at the top of the first column of the margin of page 97. Other similar language may be found in the margin on page 94.

U.S. v. 2.4 Acres of Land (7th C., 1943) 138 F. 2d 295, 298.

2. The Declaration of Taking statute is in derogation of common law and should be strictly construed. A condemnation action is one at common law. *Kohl* v. *United States* (1875) 91 U.S. 367, 376. Prior to the enactment of the Declaration of Taking statute the common law rule in condemnation cases was that title did not pass to the United States until final judgment—which determined *all* questions i. e. both the validity of the taking and the amount of compensation. *Luxton* v. *North River Bridge Co.* (1892) 147 U.S. 337, 341; *Ranson Lumber Company* v. *United States* (1923) 261 U.S. 581, 587. The compensation not only had to be ascertained but had to be in fact paid for title to vest in the taker. *Cherokee Nation* v. *Southern Kansas Ry. Co.* (1890) 135 U.S. 641, 659. The Declaration of Taking statute is in derogation of this common law rule.

C. The Construction of a Statute Which Will Support its Constitutionality is the One Which Should be Adopted By The Court

This is indisputable. *United States* v. *Cohen Grocery Co.* (1920) 255 U.S. 81, 92-93. But if in this case, a construction of the Declaration of Taking statute were made that fee simple title passes, such an interpretation "would raise serious question concerning the statute's validity." *Catlin* v. *U.S. supra*, 324 U.S. at p. 241.

In other words the *Catlin* case, *supra*, holds at least one thing. That one holding is as follows:

Where a landowner contests the validity of the condemnation and despite this a declaration of taking is filed, the United States may or may not get some sort of interest in the land. Whatever that interest may be, however, it is *not* a fee simple. Otherwise, the statute is unconstitutional and void.

The whole case of the defendant here has been bottomed on the assumption that the United States had complete fee

ownership of plaintiffs' house and lands on September 1, 1959. This premise is obviously erroneous.

Three alternatives with relation to title may be considered in discussing the effect of the filing of a declaration of taking by the United States in a case where the landowners contest the validity of the condemnation.

1. Fee simple title. This is the contention of the Department of Justice in this case. The *Catlin* case, *supra*, holds squarely *contra*. (324 U.S. at p. 241.) That case states that whatever property right may be obtained by the United States, under no circumstances does a fee simple title vest in the United States. To hold that a fee simple vests in this case would render the Declaration of Taking statute invalid. (324 U.S. at p. 241.)

2. Defeasible title. This suggestion is made in the *Catlin* case, *supra*. (324 U.S. at p. 241.) But it is obvious from the context the Court was under the impression that this was the only alternative to holding that "title passes irrevocably" (324 U.S. at p. 241.)—i.e. fee simple title.

3. No property right whatever. This last result would accord with the canons of construction outlined previously. It avoids holding the statute unconstitutional which would have to be done if it were said that fee title were to vest. (324 U.S., at p. 241.) It is the stricter of the second and third alternatives. It has the support of language in the case law:

"A nullity, ineffective to vest title." *City of Oakland* v. *U.S.* 124 F. 2d 959, 963 (9th Cir. 1942), aff'g 37 F. sup. pp. 298, 300. See also the statement in the *Catlin* case, *supra*:

"We think the purpose was to leave intact the owner's remedy before the statute was adopted." 324 U.S., at p. 240.

It would seem that if the remedy has been left intact, certainly the owner's former property right, that of title, should also be left intact.

Plaintiffs' Motion for Reconsideration

Hence the United States had no fee title to plaintiffs' lands when Congress passed the Act of September 1, 1959 (Public Law 86-220, 73 Stat. 451) which empowered the Federal Aviation Agency to grant a right to a qualified grantee both to "dismantle" plaintiffs' home and "salvage and remove" its historic objects. That Act was an assertion of full dominion over plaintiffs' home and lands. The plaintiffs have shown that a proper interpretation of the Declaration of Taking statute is the United States had no property right in their lands on September 1, 1959. But even if the United States had a defeasible fee on that date, it would make no difference. Either no title or defeasible title are far different property from that complete ownership in fee which the United States, as well as anyone else, must have in order to exercise "unfettered power of disposition" (D. rep. br. p. 2).

It is clear that under the Act of September 1, 1959 (Public Law 86-220, 73 Stat. 451) Congress intended to take plaintiffs' home and lands in fee simple irrespective of whether or not the United States had previously acquired fee title, and having by that statute taken such full title, intended to dispose of the most vital part thereof, the mansion "Leeton", in a manner which would forever bar the plaintiffs from regaining it—namely demolition.

Thus the source of the taking authority here is the Act of September 1, 1959 (Public Law 86-220, 73 Stat. 451). Thereafter on January 14, 1960, (Pl. p. 6), the Federal Aviation Agency granted the "salvage rights" to the Fairfax Park Authority whose physical entry on the property on February 1, 1960, (Pl. p. 6), constituted the actual "taking" in this case.

This is a direct legislative taking. Under the Tucker Act, since the sum involved is over $10,000, only this Honorable Court has jurisdiction.

It is therefore respectfully requested that this Honorable Court reconsider its opinion of March 1, 1961, and having reconsidered, deny defendant's motion and grant plaintiffs' motion.

Respectfully submitted,

LEWIS S. TRAVIS
Pro Se

ERNEST N. HUDGINS
Attorney for Plaintiff
JEAN S. TRAVIS

IN THE UNITED STATES COURT OF CLAIMS

286-56	Josephine C. Rumley, Admx.	v. THE UNITED STATES
168-59	Socony Mobil Oil Co., Inc.	
169-59		
187-59		
188-59	Mississippi Shipping Co., Inc.	
442-59	Harvey S. Haislip	
218-60	Lewis S. Travis, et al.	

ORDER

These cases come before the court on motions for rehearings, amendment of judgments or new trials under Rules 53 or 54 of the Rules of this court and, on consideration thereof.

IT IS ORDERED this third day of May, 1961 that said motions be and the same are overruled as follows:

286-56 Josephine C. Rumley, Admx. Plaintiff's motion.
168-59, 169-59, 187-59 Socony Mobil Oil Co., Inc. Defendant's motion.
188-59 Mississippi Shipping Co., Inc. Defendant's motion.
442-59 Harvey S. Haislip. Plaintiff's motion.
218-60 Lewis S. Travis, et al. Plaintiff's motion.

BY THE COURT

MARVIN JONES
Chief Judge

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No. 153

In the Supreme Court of the United States

OCTOBER TERM, 1961

LEWIS S. TRAVIS AND JEAN S. TRAVIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
ROGER P. MARQUIS,
Attorney,
Department of Justice,
Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 153

LEWIS S. TRAVIS AND JEAN S. TRAVIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In execution of plans for the construction of the Dulles International Airport near Washington, D.C., proceedings were filed in the appropriate federal district court to condemn, among other lands, two parcels owned by petitioners. An order of possession was entered in January 1958, when the complaint was filed, but was vacated in July by an order providing for possession if and when a declaration of taking* was filed. A declaration of taking was filed in September 1958, together with a deposit of $75,000 as estimated compensation. Petitioners withdrew the estimated compensation in October 1958. On April 26, 1960, the commissioners appointed by the district

*See Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C. 258a.

court filed their report determining that the value of the property was $79,250. No final judgment has yet been entered, however, and the district court proceedings are still pending.

In September 1959, a year after the declaration of taking, Congress passed a special act authorizing the Federal Aviation Agency to provide for the preservation of certain historic buildings on the property by conveying them, with necessary easements, to an appropriate state or private organization. P.L. 86–220, 73 Stat. 451 (Pet. 5a–6a). Pursuant to that Act, the Fairfax County Park Authority was given authority to take possession of the buildings, and it did so on February 1, 1960.

The present suit was brought in the Court of Claims to recover just compensation for the property measured by its value on February 1, 1960—allegedly much higher, because of an intervening change in the local zoning ordinances, than its value in September 1958, the date of the declaration of taking. The theory of the action was that the declaration of taking was ineffective and the taking did not occur until the entry by the Park Authority in 1960. The Court of Claims dismissed the petition on the ground that the federal district court, where the condemnation proceedings were pending, was the proper forum to adjudicate the validity and date of the taking.

Petitioner's challenges to the authority to condemn their property and to the effectiveness of the declaration of taking—though without merit in any event—are beside the point here, for the sole ground for the decision below was that those are matters to be

determined in the pending condemnation action. The district court's rulings on those issues in the condemnation proceeding, if properly presented and preserved, can be fully reviewed by an appeal in that action, and the Court of Claims was clearly correct in declining to review them here. The petition for certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
ROGER P. MARQUIS,
Attorney.

JULY 1961.

U.S. GOVERNMENT PRINTING OFFICE 1961